Supreme Court, U.S.
FILED

001556 APR 10 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JAMES M. FEJES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ANDREW PARNES
Attorney at Law
P.O. Box 5988
160 Second Street, Suite 216
Ketchum, Idaho 83340
Tel: (208) 726-1010
Fax: (208) 726-1187

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTIONS PRESENTED

I. Whether the plain language of the Lacey Act (16 U.S.C. § 3372) requires that the game be taken illegally prior to the sale of the guide's services for the sale to become an independent basis for the finding of a criminal violation.

II. Whether felony liability under the Lacey Act should be determined solely on the basis of the market value of the guiding services where the client of a guide conducting an otherwise legal hunt violates a minor state hunting law.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 4

I. THE LACEY ACT REQUIRES THAT THE ILLEGAL TAKING OF WILDLIFE PRECEDE THE SALE IN ORDER TO IMPOSE FELONY LIABILITY 5

II. THE MARKET VALUE INSTRUCTION APPROVED BY THE NINTH CIRCUIT MUST BE REJECTED IN LIGHT OF *ROMANO* AND THE LANGUAGE OF THE LACEY ACT 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

FEDERAL CASES

United States v. Atkinson, 966 F.2d 1270 (9th Cir. 1992) 10, 11

United States v. Carpenter, 933 F.2d 748 (9th Cir. 1991) 6, 7

United States v. Fejes, 232 F.3d 696 (9th Cir. 2000) 1, 2, 5

United States v. Romano, 137 F.3d 677 (1st Cir. 1998) 5, 6, 7, 9, 12

United States v. Stenberg, 803 F.2d 422 (9th Cir. 1986) 10

United States v. Todd, 735 F.2d 146 (5th Cir. 1984) .. 10, 11

CONSTITUTIONAL AND FEDERAL STATUTES

U.S. Const. amend. V 1

16 U.S.C. § 3372 ..... 1, 2, 5, 7, 8

16 U.S.C. § 3373 ..... 1, 2, 6

18 U.S.C. § 2 2

18 U.S.C. § 371 2

28 U.S.C. § 1254(1) 1

MISCELLANEOUS

Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 Public Land Law Review 27, 59-60 6

Senate Report No. 97-123, 1981 USCCAN 1748 ... 11, 12

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-15) is reported at 232 F.3d 696 (9th Cir. 2000). The panel opinion of the court of appeals denying rehearing and rehearing en banc is set out in the appendix at App., *infra*, 16.

JURISDICTION

The judgment of the court of appeals affirming petitioner's felony convictions under the Lacey Act was entered on November 14, 2000. Petition for rehearing was denied on January 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. section § 1254(1) which provides for review of cases in the courts of appeals by writ of certiorari after rendition of judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 5th Amendment

Title 16 U.S.C. § 3372(a)(2)(A)

Title 16 U.S.C. § 3373(d)(1)(B)

STATEMENT

The Lacey Act makes unlawful the sale or purchase of game which has been taken illegally under state law. In certain situations, the Act imposes felony punishments

for acts which constitute misdemeanor conduct under state law. Petitioner James Fejes was convicted of conspiracy to violate the Lacey Act under 18 U.S.C. § 371, and two substantive violations of the Lacey Act under 16 U.S.C. §§ 3372(a)(2)(A), 3373(d)(1)(B), and 18 U.S.C. § 2. At trial, the jury was instructed that a substantive violation of the Act results where there is a "sale of wildlife," and that such a sale occurs when the guiding services are sold. The jury was not instructed that the purpose of guiding services must be for taking game illegally or that the game be taken illegally prior to the actual sale of the guiding services in order to invoke the criminal provisions of the Act.

Additionally, the jury was instructed that they could consider the value of the guiding services for the value of the game taken illegally. The jury was not instructed on any other basis to determine the value of the game. Other than the value of the guiding services, which was not paid "for the illegal taking of game," there was no evidence that the value of the game was in excess of $350, which is a required element of a felony charge under the Lacey Act.

On appeal, petitioner contended that the district court erred by failing to instruct the jury that the knowledge of the illegal taking of caribou had to precede the sale of guide services in order for the criminal liability to apply. The court of appeal rejected this contention, holding that a "sale" of wildlife for purposes of 16 U.S.C. § 3373(d)(1)(B) encompasses not only the agreement to provide guide or outfitting services, but also the actual provision of such services. *United States v. Fejes*, 232 F.3d 696 (9th Cir. 2000).

Petitioner is a licensed hunting guide in the State of Alaska. In the summer of 1996, he arranged to take two out-of-state hunters on a guided caribou hunt in Alaska. One of the hunters, Buck McNeely, produced a television show entitled "The Outdoorsman with Buck McNeely." McNeely arranged the hunt with petitioner in August 1996, to be filmed for presentation in McNeely's television show. Petitioner agreed to the hunt and did not charge McNeely with the understanding the he would receive publicity from being on the television show and a thirty second advertising spot at the end of the show. The estimated value of this "advertising" was approximately $3000. The other hunter was a friend of McNeely's, Michael Doyle, who joined the hunting trip for a fee of $3,500, which he paid upon arriving in Alaska. Hunting licenses were purchased and all witnesses testified that the group was planning a hunt which complied with the laws of the State of Alaska.

The plan for the caribou hunt was to fly the hunters and an assistant guide out to a "spike"[1] camp away from the base camp, in an area where the guides expected to find caribou. Two days after arriving at the base camp, the hunters and the assistant guide were flown to the spike camp. Petitioner remained at the base camp. The plan was to set up the spike camp and hunt early the next morning. This was because during the month of August, Alaska law prohibits hunting caribou the same day as being airborne, i.e., no game can be shot before 3:00 a.m. the day following flying. After arriving at the spike camp,

---

[1] A spike camp is a temporary hunting camp erected in the field.

the hunters and the assistant guide went to look for caribou and to film wildlife scenery. During that excursion, Doyle shot and killed a caribou. After the illegal caribou kill, petitioner flew over the spike camp, was waved down by the assistant guide and told about the illegal taking of caribou. Petitioner flew back to base camp to read the regulations because he was concerned about what to do. He then flew back to get the caribou and to speak with the client hunters about his responsibility for their illegal actions. Two days later, petitioner and McNeely flew out to the spike camp to obtain more film footage. Petitioner did not carry a weapon with him that day. McNeely shot a caribou without waiting until the next day. No one reported the violations to the Fish and Game authorities, although petitioner believed the hunters would report their error. The hunters took some of the caribou meat and the racks from the animals back to their home states.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the circuits differ as to the interpretation of the Lacey Act in applying criminal liability in this context, and because the Ninth Circuit decision in this case is erroneous as a matter of statutory interpretation and constitutional law.

I. THE LACEY ACT REQUIRES THAT THE ILLEGAL TAKING OF WILDLIFE PRECEDE THE SALE IN ORDER TO IMPOSE FELONY LIABILITY

Throughout the trial, relying on the First Circuit's opinion in *United States v. Romano*, 137 F.3d 677 (1st Cir. 1998), petitioner asserted that he had to have knowledge of the illegal taking of wildlife, before the sale of his services, to fall within the criminal provisions of the Lacey Act. The trial court disagreed and held that *Romano* did not apply. The court of appeals affirmed the trial court's ruling. Although it agreed that the plain language of the statute limits felony liability to instances where a defendant knows that "wildlife" was illegally taken before he "sells" or "purchases" it, the court held that a "sale" of wildlife is deemed complete only after the provision of guide services, not merely after the making of financial arrangements. 232 F.3d at 701. The court of appeals erred in its interpretation of the statute.

The Lacey Act makes illegal a wide range of conduct in its Prohibited Acts section. Specifically, as related to the charges in this case, this section of the Act makes it

> " . . . unlawful for any person to import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce, (a) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation, of any State . . . "

16 U.S.C. § 3372(a)(2)(A).

However, the Lacey Act does not criminalize all prohibited acts. The criminal provisions of the Act, related to

the instant charges, instead limit the application of this section by requiring that the conduct involve

> " . . . the sale or purchase of, the offer to sell or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350, *knowing that the fish or wildlife or plants were taken*, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation."

16 U.S.C. § 3373(d)(1)(B) [emphasis added].

As the First Circuit noted,

> "[a]lthough this provision bears the caption 'Criminal penalties,' it does not simply prescribe punishment for conduct described elsewhere in the Act. Instead, the provision sets forth the substantive elements of the Act's criminal offense by defining, and attaching criminal consequences to, a subset of the 'unlawful' conduct described in 16 U.S.C. § 3372."

Romano, 137 F.3d at 679.

The clear statutory language requires a "two-step" analysis in the determination of whether a person has violated the Lacey Act. "In order to violate the Lacey Act a person must do something to wildlife that has already been 'taken or possessed' in violation of the law." *United States v. Carpenter*, 933 F.2d 748, 750 (9th Cir. 1991); Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 Public Land Law Review 27, 59-60.

Building upon this "two-step" requirement of the Lacey Act, the First Circuit in *Romano* held that in order to be in violation of the criminal provisions of the statute,

the accused must engage in the prohibited conduct " 'knowing that the . . . wildlife . . . were taken, possessed, transported, or sold in violation of law . . . ' " *Romano*, 137 F.2d at 681. Thus, even though the 1988 amendments to the Lacey Act made the purchase or sale of guiding services for the prospective illegal taking of game unlawful (16 U.S.C. § 3372(c)(1)), the amendments did not criminalize this conduct because the criminal statute still requires that the person know that the game had already been taken illegally.

As the court in *Romano* observed, "Congress' use of the word 'were' implies that, at the time of the purchase [or sale], the underlying taking, possession or act of transport cannot still be in prospect; it must have already occurred." *Romano*, 137 F.3d at 681, citing *Carpenter*, 933 F.2d at 750-51.

At trial, the district judge was made aware of the *Romano* decision but chose to ignore its clear application to this case, stating "I made a calculated decision that we would not follow that – that decision in this – in this case, and the matter is preserved both previously and now with respect to instruction – supplemental instruction B." Yet, the evidence here is clear that at the time of the sale and purchase of the guiding services, there was no plan to violate any state law. Both McNeely and Doyle testified that there was no mention of violating state law at the time of the sale and purchase of the guiding services. Each hunter obtained valid licenses and the alleged illegal act was the violation of the same day airborne hunting which occurred after the sale of the guiding services. Thus, the sale of the guiding services could not have been

made by petitioner at a time when he knew the game was taken in violation of state law.

Nor is evidence in this case sufficient to prove that the sale of the guiding services was made "*for* the illegal taking" of game as required under 16 U.S.C. § 3372(c)(1)(A) [emphasis added]. The jury was instructed as follows regarding the sale of wildlife: "The term 'sale' means to offer or provide, for money or other consideration, guiding, outfitting, or other services for the illegal taking, acquiring, receiving, transporting, or possessing of wildlife." During deliberations, the jury asked "Does the provision of guiding services for the purpose of legalling (sic) acquiring wildlife constitute 'sale' of wildlife?" In response the judge answered, "No. Please refer to the last paragraph of Instruction No. 28." After this note, the jury again inquired of the judge: "It remains unclear to us (one juror) what constitutes sale of wildlife." The court again responded that Instruction No. 28 controlled.

At no point was the jury informed that petitioner had to know that the game had already been illegally taken, before his sale of guiding services, to fall under the criminal provisions of the Lacey Act. Failure to properly instruct on the elements of the offense violated petitioner's guarantee of the due process of law under the Fifth Amendment.[2] Therefore, his convictions for the

---

[2] The conspiracy charge contained in Count I must also be reversed because the jury was instructed that Petitioner entered into an agreement "to commit at least one crime in violation of the Lacey Act as charged in Counts 2 or 3 of the indictment." Thus, the conviction on this count is unconstitutional, because the conspiracy is based on the improper definition of the elements of the underlying offenses.

substantive Lacey Act violations must be reversed and a judgment of acquittal entered on these counts because the judge improperly instructed the jury and there was insufficient evidence of prior knowledge presented had the jury been properly instructed. *Romano*, 137 F.3d at 682.

The Ninth Circuit distinguished *Romano*, holding that the sale of guiding services continues throughout the hunt and thus is different than the purchase of such services by the hunter. Of course, there is no such distinction as the hunter continues to receive the benefits of the guiding services after the actual financial transaction. Thus, the Ninth Circuit's limitation of *Romano* fails and the clear language of the statute controls. Review by this Court is required to affirm the validity of *Romano's* statutory interpretation and to reverse the Ninth Circuit's incorrect interpretation of the Lacey Act.

II. THE MARKET VALUE INSTRUCTION APPROVED BY THE NINTH CIRCUIT MUST BE REJECTED IN LIGHT OF *ROMANO* AND THE LANGUAGE OF THE LACEY ACT

Petitioner relied on the *Romano* case during the trial and argued to the jury that there was insufficient evidence of market value. He objected to the jury instruction outlining the market value definition which included the value of the guiding services themselves. The trial court erred in instructing on the definition of market value. The court of appeals erred in affirming the trial court.

The trial judge only instructed the jury that the market value of the game "may be established by the price

paid by a hunter for a guided hunt." The sole evidence about the value of the game was the price paid by Doyle for his hunt and the estimated value of the publicity given Petitioner in exchange for the hunt by McNeely.

The Ninth Circuit has held that the value of wildlife may be valued by the cost of the guided hunt.[3] *United States v. Atkinson*, 966 F.2d 1270, 1273 (9th Cir. 1992). However, the court in *Atkinson* was not asked to address the statutory construction issues raised before the First Circuit in *Romano*. Thus, while the 1988 amendments to the Lacey Act were adopted in part to overrule the decision in *United States v. Stenberg*, 803 F.2d 422 (9th Cir. 1986), that a sale of guiding services was not covered by the Act, the actual amendment adopted by Congress did not affect the criminal provisions of the Act.

As the court in *Atkinson* noted, *Stenberg* provides little guidance on the valuation issue because the court never reached that claim. *Atkinson* did rely on a Fifth Circuit case, *United States v. Todd*, 735 F.2d 146 (5th Cir. 1984), for its value of the guiding services approach. In *Todd*, two defendants were convicted of a Lacey Act conspiracy violation and one of the defendants of a substantive Lacey Act violation. In discussing the conspiracy charge which was based on an offer to sell guiding services, the Fifth Circuit held that the "best indication of

---

[3] It must be noted that the district court in *Atkinson* provided alternative means of calculating the market value – the guiding services or the value of the game if sold on the open market – while the district court here only instructed on the value of the guiding services. At trial here, there was no evidence of the value of the game itself.

the value of game 'sold' in this manner is the price of the hunt." *Todd*, 735 F.2d at 152.

However, in considering the substantive Lacey Act violation, the Fifth Circuit looked at the market value of the game itself, rejecting the value of the hunt as a basis for finding a felony violation. One of the hunters testified that he paid $600 for the hunt, which the government contended was sufficient evidence of a felony violation. The court rejected that argument holding that for a violation of the substantive act, "the statute requires proof of the value of the wildlife actually taken." *Ibid.* Since "[t]he government offered no evidence that the value of the dead eagle, deer, or javelina exceeded $350. . . . we hold that the evidence was insufficient to support [the defendant's] conviction under the substantive violation of the Lacey Act." *Ibid.* Based upon this closer examination of *Todd*, the holding in *Atkinson* and followed in this case must be rejected.

An examination of the legislative history of the recent Lacey Act amendments also demonstrates that market value test of *Atkinson* for substantive violations is erroneous. The report on the 1981 amendments referred to the importance of the market value test as follows: "Inclusion of a market value test is useful to distinguish small scale commercial activity that may not warrant a felony penalty, such as the sale of one illegally taken duck, from commercial activity that does warrant such a penalty, such as the sale of ten ducks, one endangered species, or other valuable wildlife." (S. Report No. 97-123, reprinted in, 1981 USCCAN 1748, 1759.) In discussing the civil penalty provisions, the report also looked to the market value of the game itself. "Thus, if a state law

provides a maximum civil penalty of $450 for the illegal taking of ducks and the market value of the duck or ducks involved in a violation of this Act does not exceed $350, the maximum civil penalty under this Act for the illegal interstate transportation of said duck or ducks would be $450." (S. Report 97-123, reprinted in, 1981 USCCAN at 1756-57.)

The logic of the decision in *Romano* mandates the conclusion that it is the market value of the game itself, not the value of the guide services, which should control this question. If the unlawfulness is the *sale of the services for the illegal taking of game*, then the market value of those services should be considered; however, if the guiding services are offered for a legal purpose and, thereafter, there is an illegal taking of game which results in a Lacey Act violation, it must be the value of the game itself which is the determinative factor. The guiding services will always overstate the true market value of the game, because the services include extensive transportation, food and lodging in addition to the actual hunting of the game.

In this case, the purpose of the hunt was to take game legally. Caribou are not an endangered species. During the hunt, and on one occasion when petitioner was not present, game was illegally taken under the state's "same day airborne" law. Because the guide services were the only basis for determination of market value, petitioner became liable for a felony violation. If the decision of the Ninth Circuit is not reversed, legitimate guides throughout the country will be liable for a felony conviction and its direct consequences, such as the loss of the right to possess firearms and the loss of a guiding license, in

situations where a client violates a minor state regulation during an otherwise legal hunt. Review is necessary to assure that the Ninth Circuit's overly broad interpretation of the statute does not put at risk all legitimate guides throughout the country.

CONCLUSION

Because the circuits are split on the interpretation of the felony provisions of the Lacey Act, and because the Ninth Circuit has reached a decision in this case which is fundamentally unfair to persons charged with violating the Act, this Court should grant certiorari.

Respectfully submitted,

ANDREW PARNES
Attorney for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	No. 99-30144
v.	D.C. No. CR-98-00167-HRH
JAMES M. FEJES, *Defendant-Appellant.*	OPINION

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Chief District Judge, Presiding

Argued and Submitted
Oct. 2, 2000 – Seattle, Washington

Filed Nov. 14, 2000

Before: Alfred T. Goodwin, Arthur L. Alarcon,
and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Alarcon

COUNSEL

Andrew M. Parnes, Ketchum, Idaho, for the defendant-appellant.

Evelyn S. Ying and Andrew C. Mergen, Department of Justice, Washington, District of Columbia, for the plaintiff-appellee.

OPINION

ALARCON, Circuit Judge:

James M. Fejes appeals from the judgment entered following his felony convictions for conspiracy to violate the Lacey Act under 18 U.S.C. § 371, and two substantive violations of the Lacey Act under 16 U.S.C. §§ 3372(a)(2)(A), 3373(d)(1)(B), and 18 U.S.C. § 2. The jury found that Fejes sold caribou in violation of the Lacey Act by providing guide services to two hunters that took the caribou in violation of Alaska law. Fejes contends that the district court erred by failing to instruct the jury that the illegal taking of the caribou must have preceded his sale of guide services in order for criminal liability to apply. We hold that a "sale" of wildlife for purposes of 16 U.S.C. § 3373(d)(1)(B) encompasses not only the agreement to provide guide or outfitting services, but also the actual provision of such services. We conclude that the district court properly instructed the jury, and thus affirm Fejes's convictions.

I

Fejes was indicted along with three codefendants in a three count indictment on October 22, 1998. The defendants were charged with conspiracy and two substantive

violations of the Lacey Act. The indictment also alleged a forfeiture under 16 U.S.C. § 3374(a)(1)-(2).

Fejes is a licensed hunting guide in Alaska. In the summer of 1996, Fejes agreed to take two out-of-state hunters, Jon "Buck" McNeely and Michael Doyle, on a guided caribou hunt in Alaska. Doyle paid Fejes $3500 for the hunt when Doyle first arrived in Alaska on August 16, 1996. McNeely, who produces a syndicated "outdoorsman" television show, did not pay cash for the guided hunt, but agreed to give Fejes a 30-second advertising spot on McNeely's show in exchange for Fejes's services. McNeely estimated the value of the advertising spot to be approximately $2750.

On August 18, 1996, Fejes and his employees flew McNeely and Doyle to a remote "spike camp"[1] to hunt caribou. Also in the party were John Helgren, a videographer hired by McNeely to film the hunts, and Blaine Morgan, a licensed hunting guide employed by Fejes. After Fejes dropped off McNeely, Doyle, Helgren, and Morgan at the spike camp, Fejes flew off to another location. Shortly thereafter, Morgan guided McNeely, Doyle, and Helgren in pursuit of caribou. Doyle shot and killed a caribou, in violation of an Alaska regulation that prohibits hunting on the same day that a hunter is airborne. *See* Alaska Admin. Code tit. 5, § 92.085(8) (2000).[2]

---

[1] A spike camp is a temporary hunting camp erected in the field.

[2] Section 92.085(8) provides that "a person who has been airborne may not take or assist in taking a big game animal until after 3:00 a.m. following the day in which the flying occurred[.]" Alaska law prohibits taking game unless permitted by Alaska statutes or regulations. *See* Alaska Stat. § 16.05.920(a) (1999).

The hunting party hiked back to the spike camp, where they met up with Fejes. Morgan immediately told Fejes about the caribou kill, and Fejes testified that he recognized that there was a "problem" because "same-day airborne is not legal." Fejes and his employees then flew the hunting party, along with meat and the antlers from Doyle's caribou, back to the base camp.

On August 20, 1996, Fejes piloted McNeely from the base camp to look for caribou from the air. Fejes and McNeely spotted a caribou, and Fejes landed the airplane nearby. Cameraman Helgren was in another airplane piloted by one of Fejes's employees which also landed at the site. A few minutes later, McNeely shot and killed a caribou that he and Fejes had spotted from the air. Fejes testified that McNeely was carrying a gun as he approached the caribou, but that he expected Helgren to film the caribou. He did not know that McNeely intended to kill it. Helgren testified, however, that Fejes told him that morning that "[w]e're going out to kill a caribou here today." Helgren also testified that Fejes congratulated McNeely for killing the caribou. Fejes and McNeely then posed for a photograph standing over the dead caribou, both with their thumbs up.

Morgan field-dressed the caribou, and Fejes and his employees flew the caribou meat back to base camp. Neither Fejes, McNeely, Doyle, nor any of Fejes's employees reported either of the illegal hunts to state authorities. Doyle and McNeely took caribou meat from their kills back to their home states. The Doyle and McNeely hunts were featured on McNeely's syndicated television program, which aired twice. An advertisement

for Fejes's guide services was shown at the conclusion of both airings.

Prior to trial, Fejes's three codefendants pleaded guilty to misdemeanor violations of the Lacey Act. Fejes proceeded to trial. The jury convicted him of felony conspiracy to violate the Lacey Act and felony violations of the Lacey Act under 18 U.S.C. § 371, 16 U.S.C. §§ 3372(a)(2)(A), 3373(d)(1)(B), and 18 U.S.C. § 2. The district court sentenced Fejes to serve six months and one day in prison, followed by two years of supervised release, and imposed a fine of $5000. Fejes filed a timely notice of appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II

Fejes contends that the district court erred by failing to instruct the jury that the illegal taking of wildlife must precede the sale of guide services to fall within the criminal provisions of the Lacey Act. The district court instructed that to convict Fejes, the jury must find (1) that Fejes "knowingly engaged in conduct that involved a sale or purchase of the caribou," (2) that Fejes "knew that the caribou had been taken, possessed, transported or sold" in violation of law, (3) that the market value of the caribou exceeded $350, and (4) that Fejes "knowingly sold or transported the caribou in interstate commerce." Fejes objected to the court's instruction on the grounds that it incorrectly stated the elements required for criminal liability under the Lacey Act. We review de novo whether a jury instruction misstates elements of a statutory crime. *See, e.g., United States v. Frega*, 179 F.3d 793, 806 n. 16 (9th

Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 1247 (2000), *and cert. denied sub nom. Adams v. United States*, ___ U.S. ___, 120 S.Ct. 1443 (2000).

The Lacey Act makes it unlawful to transport, sell, or purchase "in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State. . . . " 16 U.S.C. § 3372(a)(2)(A). A "sale" of wildlife includes the offer or provision of "guiding, outfitting, or other services . . . for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife." 16 U.S.C. § 3372(c)(1). The Lacey Act imposes felony penalties if the defendant "knowingly" engages in conduct that involves the sale of wildlife "with a market value in excess of $350, knowing that the fish or wildlife or plants *were taken, possessed, transported, or sold in violation of . . . any underlying law, treaty or regulation*. . . . " 16 U.S.C. § 3373(d)(1)(B) (emphasis added).

Fejes argues that we must reverse the judgment of conviction because McNeely and Doyle took caribou in violation of Alaska's same-day shooting ban *after* Fejes agreed to guide their hunts. Fejes contends that this interpretation is mandated both by a plain reading of the statute, and by *United States v. Romano*, 137 F.3d 677 (1st Cir. 1998). The First Circuit held in *Romano* that "a hunter who purchases guiding or outfitting services to assist him in a *prospective* unlawful taking of wildlife can neither know nor have reason to know at the time of his purchase that the wildlife he has constructively purchased by operation of 16 U.S.C. § 3372(c) 'were taken' (or, for that matter, 'possessed' or 'transported') in violation of state

law." *Id.* at 681. The *Romano* court reasoned that "Congress' use of the word 'were' [in the criminal statute] implies that, at the time of the purchase, the underlying taking, possession, or act of transport cannot still be in prospect; it must have already occurred." *Id.*

"In determining the scope of a statute, we look first to its language." *United States v. Turkette*, 452 U.S. 576, 580, (1981). "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *Id.* (citation omitted). We agree with the First Circuit that the plain language of 16 U.S.C. § 3373(d)(1)(B) limits the felony liability under that section to instances where a defendant knows that wildlife "were" illegally taken before he "sells" or "purchases" the wildlife.

This is not the end of our inquiry, however. We must also determine when a "sale" of wildlife is deemed complete for purposes of § 3373(d)(1)(B). The *Romano* court considered this issue in regards to a purchaser – not a seller like Fejes – and concluded that it is "obvious, or at least plausible, that Romano 'engag[ed] in' this [purchase] . . . only for so long as it took him to consummate his purchases of services."[3] 137 F.2d at 681 (citation omitted). We reject Fejes's contention that this definition of a "purchase" by a hunter controls our interpretation of a "sale" made by a guide or outfitter.

---

[3] *Romano* considered "purchase" as defined by 16 U.S.C. § 3372(c)(2), which mirrors "sale" as defined by 16 U.S.C. § 3372(c)(1).

The Lacey Act defines a sale of wildlife to encompass the situation where "a person for money or other consideration to offer or *provide . . . guiding, outfitting, or other services . . . for the illegal taking* [of wildlife]." 16 U.S.C. § 3372(c)(1)(A) (emphasis added). The plain language of the statute indicates that the *provision* of guide services for the illegal taking of wildlife constitutes a sale, not merely making financial arrangements for such services. The legislative history of the 1988 amendment to the Lacey Act is in accord. The Senate Report indicates that the amendment was intended to make the "providing of guiding services used in the illegal taking of wildlife or the issuance of illegal hunting or fishing licenses. . . . subject to the enforcement provisions of the Lacey Act." S.Rep. No. 100-563, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5366, 5370. Similarly, the House Report on the 1988 amendment states that the purpose of 16 U.S.C. § 3372(c) is to render "the providing of guiding, outfitting, and transportation services . . . used in the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife" subject to the felony enforcement provisions of the Lacey Act. H.R.Rep. No. 100-732, at 12 (1988). Thus, both the plain language of the statute and the legislative history indicate that the provision of guiding or outfitting services for the illegal taking of game unambiguously falls within the criminal enforcement provisions of the Lacey Act.

Moreover, Fejes's proposed construction would lead to absurd results. For example, if we were to construe the word "sale" as suggested by Fejes, guides and outfitters would be immune from criminal liability even if they

became aware before a hunt, but after financial arrangements were made, that their customers intended to take game illegally. We must reject this construction because nothing in the statute or its legislative history suggests that Congress intended such an absurd result. *See United States v. Rocha-Leon*, 187 F.3d 1157, 1159 n. 3 (9th Cir. 1999) (stating that "interpretation that 'is consistent with the language of the statute and avoids absurd results' is preferred when 'nothing in the language or history' of the statute 'suggest[s] Congress intended the absurd results possible under [the other proposed] construction' ") (quoting *United States v. Alfeche*, 942 F.2d 697, 698-99 (9th Cir. 1991)) (alteration in original).

Accordingly, we hold that "sale" for purposes of 16 U.S.C. § 3373(d)(1)(B) includes both the agreement to receive consideration for guiding or outfitting services and the actual provision of such guiding or outfitting services.[4] Because we determine that the plain language of § 3373(d)(1)(B) is unambiguous, Fejes may not invoke the doctrine of lenity. We conclude that the district court did not erroneously instruct the jury on this issue.

III

Fejes contends that the district court erred by instructing the jury that felony liability could be imposed for either the transportation or sale of wildlife taken in violation of state law. We review de novo Fejes's claim

---

[4] We need not consider at this time whether "sale" and "purchase" as defined by 16 U.S.C. § 3372(c)(1)-(2) have similar temporal scope.

that the district court's instruction misstates elements of the statutory crime. *See Frega*, 179 F.3d at 806 n. 16.

In one of the jury instructions, the district court stated that the Lacey Act "makes it a crime to import, export, transport, sell, receive, acquire, *or* purchase wildlife" and that the jury could convict Fejes if he "committed an offense charged by only *one* of these means (for example, transport *or* sell). . . . "[5] Fejes argues that these statements improperly instructed the jury that they could substitute "transport" for "sale" as the overlying criminal conduct under 16 U.S.C. § 3373(d)(1)(B).[6] The district court properly instructed that to convict Fejes, the jury must find that he sold or purchased the caribou. The district court also properly instructed the jury that it must find an underlying violation of the Lacey Act, namely that Fejes knowingly sold or transported the caribou in

---

[5] The district court's instruction ambiguously stated that the Lacey Act "makes it a crime to import, export, transport, sell, receive, acquire, *or* purchase wildlife. . . . " The Lacey Act makes it *unlawful* to commit any of these acts, but requires a mens rea element to impose criminal penalties. *See* 16 U.S.C. §§ 3372(a)(2), 3373(d)(1)-(3). The district court properly instructed the jury on the elements of felony liability, however, and any ambiguity did not render the instructions as a whole "misleading or inadequate to guide the jury's deliberation." *Frega*, 179 F.3d at 806, n. 16.

[6] 16 U.S.C. § 3373(d)(1)(B) imposes felony penalties only if the defendant "knowingly engag[es] in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350. . . . " Transportation of wildlife could never be the sole overlying conduct for a felony under this provision.

interstate commerce. The language cited by Fejes properly instructs that the jury could find the underlying violation to be either the knowing sale or transportation of caribou in interstate commerce. Accordingly, we determine that the district court did not erroneously instruct the jury as to the elements of § 3373(d)(1)(B).

Fejes also contends that the district court erred by failing to instruct that the jury must unanimously agree as to the method by which Fejes violated the Lacey Act. Because Fejes failed to request a unanimity instruction at trial, this claim is reviewed under the plain error standard. *See United States v. Bryan*, 868 F.2d 1032, 1038 (9th Cir. 1989). The general rule is that the district court need not instruct the jury "that a single set of facts on a single theory of liability must be agreed upon." *United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983). Fejes fails to demonstrate that the facts of this case are so complex as to require a special instruction. Thus, we conclude that the district court did not commit plain error by failing to give a unanimity instruction.

IV

Fejes contends that the district court erred by refusing to instruct the jury that he was required by Alaska law to transport the caribou from the field. "[A] defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence." *United States v. Duran*, 59 F.3d 938, 941 (9th Cir. 1995) (quoting *United States v. Gomez-Osorio*, 957 F.2d 636, 642 (9th Cir. 1992) (quoting *United States v. Mason*, 902 F.2d 1434, 1438 (9th

Cir. 1990))). If the parties dispute whether the required factual foundation exists, we review for abuse of discretion. *See id.* If the defendant's theory of defense is supported by the evidence, we review de novo whether the district court's instructions adequately cover it. *See id.*

Alaska law provides that "a person may possess and transport game or parts of game taken in violation of [state law] *for the sole purpose of salvaging and surrendering that game* or parts of that game to a representative of the state. . . . " Alaska Admin. Code tit. 5, § 92.140(d) (emphasis added); *accord* Alaska Admin. Code tit. 5, § 92.220(h) (stating that a person who takes game in violation of state laws or regulations shall "immediately transport [portions of the game] from the field directly to the nearest office of the Department of Fish and Game . . . or the Department of Public Safety . . . and shall surrender them to a department representative."). Neither Fejes nor others from his hunting party surrendered the illegally taken caribou to state representatives. Fejes testified that he transported the caribou back to base camp with the belief that McNeely would surrender the caribou to authorities. Fejes contends that the district court erred by not permitting the jury to consider whether he possessed the illegally taken caribou "for the sole purpose of salvaging and surrendering" it.

We must first determine whether Fejes's proposed instruction is supported by evidence in the record. To convict Fejes under § 3373(d)(1)(B) based on an underlying violation of § 3372(a)(2)(A), the jury had to find that he knowingly sold or transported the caribou in interstate commerce. The jury also had to find that Fejes knowingly engaged in conduct that involved a sale or purchase of

the caribou. Thus, even if Fejes proved a complete defense to "transporting" the caribou, the jury necessarily found that he "sold" the caribou. The uncontested evidence offered at trial indicated that Fejes sold his guide services to two hunters that lived outside of Alaska. A primary purpose of that sale was that Fejes would help the hunters transport the meat and horns of the caribou from the field to their home states. Fejes and his employees accomplished this end by flying the meat and horns out of the field. Moreover, after the hunts had concluded, Fejes accepted nationwide television advertising of his business in exchange for his services. Fejes offered no evidence to support any reasonable conclusion other than that he sold the caribou in interstate commerce. *See United States v. Atkinson*, 966 F.2d 1270, 1275 (9th Cir. 1992) (interstate commerce element satisfied if defendant "knew that [wildlife] would be transported in interstate commerce and took the steps that began their travel to interstate markets") (quoting *United States v. Gay-Lord*, 799 F.2d 124, 126 (4th Cir. 1986)) (alteration in original). We conclude that the district court did not abuse its discretion by refusing to give Fejes's proposed instruction because there was no foundation for the jury to find that the sale did not involve interstate commerce.[7]

---

[7] Fejes's proposed instruction was also incorrect as a matter of law. The proposed instruction stated that the Government must prove that Fejes "did not possess [the caribou] with the purpose of salvaging and transporting the game to a representative of the state as required [by Alaska law.]" However, the jury could convict Fejes if it found that Fejes *either* transported *or* sold the caribou in interstate commerce.

V

Fejes contends that the trial court erred in failing to instruct on lesser included misdemeanor violations of the Lacey Act. We analyze the district court's refusal to instruct on a lesser included offense using a two part test. First, "the defendant must prove that the offense on which instruction is sought is a lesser-included offense of that charged [.]" *United States v. Vaandering*, 50 F.3d 696, 703 (9th Cir. 1995) (quoting *United States v. Pedroni*, 958 F.2d 262, 267 (9th Cir. 1992)). There is no dispute that misdemeanor violations of the Lacey Act are lesser-included offenses of the charged crimes. Second, "the defendant must show that the jury rationally could conclude that the defendant was guilty of the lesser-included offense but not of the greater." *Id.* (quoting *Pedroni*, 958 F.2d at 267-68). We review the second step of the inquiry for abuse of discretion. *See id.*

There are three substantive differences between a felony offense under § 3373(d)(1)(B) and a misdemeanor offense under § 3373(d)(2) of the Lacey Act. First, a felony requires proof that the defendant knew that wildlife was taken, possessed, transported, or sold in violation of state law. A misdemeanor only requires proof that the defendant should have known of the violation. Second, a felony requires proof that the defendant engaged in the sale or purchase of wildlife. Third, a felony requires proof that the wildlife has a market value of at least $350. *See* 16 U.S.C. §§ 3373(d)(1)(B)-(d)(2). The district court addressed only one of the three differences, finding that "no reasonable jury could . . . fail to come to the conclusion that . . . this is either a . . . knowing violation or isn't

a violation at all." Fejes does not contest this finding, but argues that the district court's failure to consider the other differences constitutes an abuse of discretion.

It was undisputed at trial that Fejes sold his guiding services to McNeely and Doyle, and that those services were worth over $350. Because there was no evidence on which the jury could reasonably conclude that Fejes had not "sold" wildlife with a market value of at least $350, the district court did not abuse its discretion by declining to instruct on the lesser included offense.

Fejes also contends that the district court erred by instructing the jury that it could determine the market value of the caribou by considering the value of Fejes's guiding services. This argument fails because, where the commodity sold is the opportunity to hunt game with the assistance of a guide, the value of an animal "sold" for purposes of § 3372(c) "is best represented by the amount a hunter is willing to pay for the opportunity to participate in the hunt." *Atkinson*, 966 F.2d at 1273 (citing *United States v. Todd*, 735 F.2d 146, 152 (5th Cir. 1984)).

CONCLUSION

We hold that a "sale" of wildlife for purposes of 16 U.S.C. § 3373(d)(1)(B) encompasses both the agreement to receive consideration for guiding or outfitting services and the actual provision of such services. We reject Fejes's contention that the district court committed instructional error. Accordingly, the district court's judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES M. FEJES, Defendant-Appellant.	No. 99-30144 D.C. No. Cr-98-00167-HRH OPINION (Filed Jan. 10, 2001)

Before: GOODWIN, ALARCÓN, and McKEOWN, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge McKeown has voted to deny the petition for rehearing en banc. Judges Goodwin and Alarcón recommend that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.